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In The

Supreme Court of the United States

October Term, 1979

No. 79-945

VICTOR J. WALL,
Appellant,

Vs.

STATE OF VERMONT,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

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December 17, 1979

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JURISDICTIONAL STATEMENT

VICTOR J. WALL, the Appellant, appeals from the final judgment of the Supreme Court of Vermont, dated September 17, 1979, in which that Court affirmed the District Court of Vermont, Unit I, Bennington Circuit's judgment of guilty with respect to the charge of driving while under the influence of intoxicating liquor in violation of Vt. Stat. Ann. tit. XXV, §1201 (a) (2).

OPINIONS BELOW

The ruling of the District Court of Vermont, Unit I, Bennington Circuit on Appellant's Motion to Suppress is unreported and is set forth in Appendix A. The opinion of the Vermont Supreme Court is reported at _____ Vt. _____, _____ A.2d _____ (1979), and is set forth in Appendix B.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on Septmeber 17, 1979. See Appendix B, at 1b. This appeal is being docketed in this Court within ninety (90) days from the entry of the Vermont Supreme Court's judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

I. Whether Vt. Stat. Ann. tit. XXV, §1205(a) and the custodial advice given pursuant thereto violate the Fifth and Fourteenth Amendments of the Constitution of the United States in that they are utilized to coerce an individual's consent to take a breath test.

II. Whether Appellant's waiver of his "*Miranda* rights," having been obtained while Appellant was injured and, allegedly intoxicated and after Appellant had unequivocally requested the presence of an attorney, satisfied the minimum constitutionally required standards applicable to such a waiver.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

No person...shall be compelled in any criminal case to be witness against himself...

Fourteenth Amendment, United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...

Vt. Stat. Ann. tit. XXV, §1205(a):

If the person refuses to submit to a chemical test, it shall not be given but such refusal may be introduced as evidence in a criminal prodeeding.

STATEMENT OF THE CASE

The Appellant was involved in a single car accident during the evening hours of July 9, 1977. According to the Vermont Supreme Court, a local police officer observed the accident and immediately proceeded to the Appellant's vehicle. Appendix B 1b.* Upon arriving at the scene of the accident, the police officer noticed that Appellant was having difficulty opening the driver's door of the automobile, apparently because of damage that the automobile had sustained in the collision. The officer, therefore, proceeded to assist the Appellant in opening the car door. When the door was finally opened, the Appellant, according to the arresting officer, stumbled out. Continuing, the court observed that the police officer, having the opportunity to observe Appellant's general appearance and behavior, and detecting the odor of alcohol on Appellant's breath took Appel-

*Hereinafter, the Vermont Supreme Court opinion, annexed hereto as Appendix B., shall be referred to as "App. B _____."

lant into custody under the charge of driving while intoxicated. App. B 2b.

The Appellant was taken into custody at the scene of the accident. App. B 2b. After taking Appellant into custody but before advising him of his *"Miranda* rights," the arresting officer carried on a conversation with the Appellant, during the course of which the Appellant made highly incriminating statements. App. B 2b. Finally, in spite of the fact that the arresting officer carried on a conversation with the Appellant, obtaining highly incriminating statements, he did not advise Appellant of his *"Miranda* rights" until sometime after they arrived at the police station.

Once Appellant was advised of his *"Miranda* rights" at the police station, he unequivocally refused to answer any further questions until an attorney was present. App. B 2b. Although the Appellant was unable to reach an attorney, the arresting officer continued his interrogation, ultimately obtaining statements tantamount to a confession from the Appellant.

During the course of the interrogation, the arresting officer requested the Appellant to take a breath chemical test. Following the precedure implementing Vt. Stat. Ann. tit. XXV, §1205(a), the officer informed Appellant that if he refused to take the breath chemical test, it would not be administered but that his refusal could be used as evidence against him in a criminal proceeding. App. B 2b. Subsequent to receiving this custodial advice, the Appellant purportedly consented to, and did, provide a breath sample.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Appellant's Waiver of his Miranda Rights.

Appellant, at a pretrial proceeding, moved to suppress the incriminating statements that he had made during the course of

his custodial interrogation. In addition, Appellant moved to suppress the results of the breath chemical test. As grounds for the suppression of his custodial statements, Appellant maintained that, because of the injuries that he sustained in the automobile accident that immediately preceded his arrest, he was incapable of knowingly and intelligently waiving — by the standards set forth by this Court's opinions in *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) — his rights against self-incrimination. Similarly, Appellant maintained that his pre-arrest injuries prevented him from knowingly and intelligently consenting to provide a breath sample.

The trial court, in denying Appellant's motion to suppress, concluded as a matter of law that Appellant had knowingly and intelligently waived his *"Miranda* rights, " both *at the scene of the accident* and later at the police station. App. A 3a. Consequently, highly incriminating statements made by the Appellant both at the scene of the accident, *before Appellant even had been advised of his rights,* and at the police station were admitted into evidence at his trial. In addition, the trial court, concluding that the Appellant had voluntarily consented to the taking of a sample of his breath, denied Appellant's Motion to Suppress the results of the breath chemical test. App. A 4a.

Appellant was tried before a jury and found guilty as charged. Subsequent to his trial Appellant reiterated both of the above claims in his post-trial motion for a judgment of acquittal and in his post-trial motion for a new trial. The trial court summarily dismissed Appellant's claims and entered a judgment of guilty on the jury's verdict of guilty.

Appellant renewed his claim — that because of his physical and mental condition he was incapable of waiving his rights againt self-incrimination as guaranteed by the Constitution of the United States — before the Vermont Supreme Court. In addition, Appellant contended that the manner in which his purported waiver was obtained was constitutionally improper. For, in spite of Appellant's unequivocal request to speak with an attorney before answering any further questions, the arresting

officer continued his interrogation of the Appellant when the Appellant's initial efforts to reach an attorney failed.

The Vermont Supreme Court, affirming the trial court's judgment, found no error in the trial court's conclusion that Appellant had knowingly and intelligently waived his rights against self-incrimination. App. B 4b. The Vermont Supreme Court observed with respect to the second portion of Appellant's claim — that his right to remain silent had been violated by the arresting officer's immediate resumption of questioning — that Appellant had not pressed this issue before the trail court. Nevertheless, at Appellant's request under the Vermont "glaring error" doctrine, the Vermont Supreme Court reviewed the record with respect to this point. App. B 5b. Stating that no evidence of coercion or undue influence appeared in the record, the Vermont Supreme Court concluded that there was no "glaring error."

In summary, both the issue of Appellant's capacity to knowingly and intelligently waive his rights against self-incrimination, and the issue of the violation of Appellant's right to remain silent are properly before this Court. The former issue was raised at every possible opportunity in the Vermont State proceedings and ultimately was ruled upon by the Vermont Supreme Court. The latter issue, while not raised at the trial level, was substantively considered and ruled upon by the Vermont Supreme Court. *See, Raley* v. *State of Ohio,* 360 U.S. 423 (1959); and *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974) ("Whether or not Appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice.").In both instances, Appellant's rights as guaranteed by the Constitution of the United States were denied by the Vermont Supreme Court.

The Unconstitutionality of Vt. Stat. Ann. tit. XXV, 1205(a).

Appellant's challenge to the constitutionality of Vt. Stat. Ann. tit. XXV, §1205(a) was before the Vermont Supreme

Court. While that court did review Appellant's challenge to the custodial interrogation procedure under its "glaring error" doctrine, the constitutionality of the statute was not so considered.

Nevertheless, the Vermont Supreme Court citing its earlier decisions on this issue, did reaffirm the constitutionality of this statute.* Mindful of this Court's policy of not considering issues rejected on an independent and adequate state procedural ground by the state courts below, *County Court of Ulster Cty.* v. *Allen,* 99 S.Ct. at 2220, and the burden of establishing that the issue was properly presented at the state level, *Street* v. *New York,* 394 U.S. 576, 582 (1969), Appellant will briefly set forth the reasons why the issue of the constitutionality of Vt. Stat. Ann. tit. XXV, §1205(a) is properly before this Court.

At the outset, Appellant notes that this Court has repeatedly stated that, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts," *Street* v. *New York,* 394 U.S. at 583 (footnote omitted). In making its determination on this point, however, this Court has shown considerable respect for the procedural rules of the state in question, typically considering, *inter alia,* the statutory and case authority for the procedural rule in question as well as for any exceptions thereto. *County Court of Ulster Cty.; Chambers* v. *Mississippi* 410 U.S. 284 (1973); *Street* v. *New York, supra; Williams* v. *Georgia,* 349 U.S. 375 (1955); *Carter* v. *Texas,* 177 U.S. 442 (1899). Only recently this Court observed that, "if neither the state legislature nor the state courts indicate that a federal constitu-

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**Cf., County Court of Ulster Cty.* v. *Allen,* ____ U.S. ____, 99 S. Ct. 2213 (1979). (In concluding that the Court of Appeals, in effect, ruled on the constitutional issue there involved, this Court equated that court's:

[R]eprise of the explanation that its prior cases [had] traditionally given for the statute in holding it constitutional and a citation of two of those cases [with] . . . *a passing and summary disposition of an issue that had already been decided on numerous occasions."*
99 S.Ct., at 2222) (emphasis added).

tional claim is barred by some state procedural rule, a federal court implies no disrespect for the state by entertaining the claim." *County Court of Ulster Cty.* v. *Allen, 99 S.Ct at 2223.*

The courts of the State of Vermont are authorized under V.R. Cr.P. 52(b) and its civil counterpart to consider issues of constitutional import even when such issues were not brought to the attention of the court below. Although the Vermont Supreme Court has indicated that this so-called "plain error" or "glaring error" doctrine is to be invoked only in the most exceptional circumstances, the cases in which it has been utilized to review the decisions of lower courts reveal that the alleged constitutional infraction need not be exceptional *See, e.g., State* v. *D'Amico,* 136 Vt. 153, 385 A.2d 1082 (1978); *In re McMorrow,* 133 Vt. 472, 346 A.2d 218 (1975); *State* v. *Garvey,* 133 Vt. 29, 329 A.2d 662 (1974); *State* v. *Conti,* 132 Vt. 83, 315 A.2d 261 (1974); *State* v. *McSheffrey,* 131 Vt. 329, 306 A.2d 702 (1973). Indeed, in the latter three cases, the Vermont Supreme Court utilized the "glaring error" doctrine to consider inadequacies in the administration of Vt. Stat. Ann. tit. XXV, §§1201-1210. Appellant's challenge, on the other hand, was and is directed not merely at administrative infirmities, but at the very constitutionality of the statute itself.

This Court has stated that:

> [W]here a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. *A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.*

Williams v. *Georgia,* 349 U.S. at 383 (footnotes omitted, emphasis added). *See also, Barr* v. *City of Columbia,* 378 U.S. 146, 149-150 (1964) ("We have often pointed out that the state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review. (citations omitted)). In *Williams,* after observing that Georgia appellate courts had discretionary authority to consider issues not raised below, and that the Georgia appellate courts had in practice utilized their discretion to consider issues similar to the one before this Court in *Williams,* this Court concluded that:

> [T]he trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.

349 U.S. at 389.

In the present case, then, Appellant maintains that his challenge to the constitutionality of Vt. Stat. Ann. tit. XXV, §1205(a) is properly before this Court. For, as was the case in *Williams* the state appellate court here declined, at least ostensibly, to review Appellant's challenge though possessed of the power to do so under state law, and though it had exercised this power to review less constitutionally fundamental challenges in similar cases involving Vt. Stat. Ann. tit. XXV, §§1201-1210. *See, e.g., Garvey; Conti; McSheffery.*

Because Appellant's challenge was based upon a constitutional objection, the vaildity of which has in principle been sustained by this Court, the Vermont Supreme Court's discretionary decision to deny to review Appellant's constitutional challenge does not deprive this Court of jurisdiction to find that the substantive issue is properly before it. *Williams* v. *Georgia,* 349 U.S. at 329; *County Court of Ulster Cty.* v. *Allen,* 99 S.Ct. 2213; *Chambers* v. *Mississippi,* 410 U.S. 294; *Street* v. *New York,* 394 U.S. 576; *Carter* v. *Texas,* 177 U.S. 442.

THE FEDERAL ISSUES INVOLVED ARE SUBSTANTIAL

I. Vt. Stat. Ann. tit. XXV, §1205(a), and the custodial advice given pursuant thereto violate the Fifth and Fourteenth Amendments of the Constitution of the United States in that they are utilized to coerce an individual's consent to take a breath chemical test.

A. The Statute is Repugnant to the Constitution.

Appellant maintained before the Vermont Supreme Court that Vt. Stat. Ann. tit. XXV, §1205(a), which provides in part that an individual's refusal to submit to a breath chemical test may be used as evidence against him, was unconstitutional. In addition, Appellant contended that the advice customarily given by the Vermont police in connection with their request that a person take a breath chemical test, being based upon this unconstitutional statute, was constitutionally erroneous. Consequently, Appellant maintained that the giving of this constitutionally erroneous advice in this custodial setting by an officer of the State, which advice formed a basis for Appellant's crucial decision, vitiated his purported consent. *State* v. *Brean,* 136 Vt. 147, 385 A.2d 1085 (1978). The Vermont Supreme Court, ostensibly refusing to consider Appellant's challenge, merely reiterated its prior rulings on the points in question.

Appellant maintains, nevertheless, that Vt. Stat. Ann. tit. XXV, §1205(a) is unconstitutional. The Fifth Amendment to the United States Constitution provides in part that, "[n]o person shall be compelled in any criminal case to be a witness against himself" This Court, *Malloy* v. *Hogan,* 378 U.S. 1 (1964), held that, by virtue of the Fourteenth Amendment to the United States Constitution, an individual's Fifth Amendment privilege against compulsory self-incrimination is protected against abridgement by the States.

Of this privilege against self-incrimination this Court has stated that the privilege protects an accused from being compelled to testify against himself, or "otherwise provide the State

with evidence of a testimonial or communicative nature." *Schmerber* v. *California,* 384 U.S. 757, 761 (1966); *Fisher* v. *United States,* 425 U.S. 391, 419 (1976) (Brennan, J., concurring). Elaborating on the meaning of the phrase "evidence of a testimonial or communicative nature," this Court noted in *Schmerber* that a "nod or handshake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words." 384 U.S. at 761, n. 5.

Turning to the substantive rights guaranteed by the Fifth Amendment, this Court has stated repeatedly that, to sustain a claim of privilege, *"it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman* v. *United States,* 341 U.S. 479, 486-487 (1951) (emphasis added); *Malloy* v. *Hogan,* 378 U.S. at 11-12; *California* v. *Byers,* 402 U.S. 424, 437 (1971) (Harlan, J., concurring). *See generally,* Mansfield, The Albertson Case: Conflict Between the Privilege against Self-incrimination and the Government's need for Information, 1966 Sup. Ct. Rev. 103.

In applying this test, it must be *"perfectly clear,* from a careful consideration of all the circumstances in the case that the answer[s] *cannot possibly* have such tendency to incriminate." *Hoffman* v. *United States,* 341 U.S. at 488. *Malloy* v. *Hogan,* 378 U.S. at 12; *California* v. *Byers,* 402 U.S. at 439 (Harlan, J., concurring).

Appellant maintains, then, that in context and setting in which an individual is asked to take a breath chemical test, an answer to the request, or an explanation of why he cannot answer the request, clearly falls within the realm of privileged communications as the likelihood of an injurious disclosure is great. The *carte blanche* statutory authorization set forth in Vt. Stat. Ann. tit. XXV §1205(a) for the admission into evidence of statements or communicative acts made by an individual refusing to take the test is, therefore, unconstitutional on its face for

such a statutory authorization cannot possibly satisfy the factual, case by case consideration mandated by this Court's well-reasoned decisions.

B. The issue here in question — the admissibility of a refusal to take a breath chemical test — has caused, and continues to cause, much controversy and litigation in both state and federal courts.

This Court, in explaining its holding in *Schmerber* specifically declined to rule on the admissibility into evidence of an individual's refusal to take a breath chemical test. This Court did note, however, that, "[i]f it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test — products which would fall within the privilege." 384 U.S. at 765, n. 9. Addressing petitioner Schmerber's claim that his refusal to submit to a "breathalyzer" test should not have been admitted into evidence, this Court, while not ruling on the issue, noted its belief that general Fifth Amendment principles would be applicable to such a claim.

In the decade and a half since this Court's decision in *Schmerber,* courts and attorneys in the several states, in weighing the admissibility of a refusal to submit to a breath chemical test, have spent a considerable amount of time trying to determine what this Court meant or was intimating by its reference to privileged "testimonial products." The numerous resulting opinions — a significant portion of which purportedly having resolved the issue on constitutional grounds and specifically citing *Schmerber* — are in hopeless conflict. *People* v. *Thomas,* 46 N.Y.2d 100, 385 N.E.2d, 584, 412 N.Y.S.2d 845 (1978), *appeal dismissed,* —U.S.—, 48 U.S.L.W. 3240 (1979); *State* v. *Andrews,* 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. denied,* 419 U.S. 881 (1974); *Gay* v. *City of Orlando,* 202 So.2d 896 (Dist. Ct. App. 1967), *cert. denied,* 390 U.S. 956 (1968); *see generally,* Annot., 87 A.L.R.2d 370 (1963). Indeed, the seriousness of the conflict among the states on this issue was the basis of Mr. Justice White's dissent — a dissent in which Mr. Justice Brennan,

the author of *Schmerber* joined in this Court's recent dismissal of the appeal in *People* v. *Thomas,* 48 U.S.L.W. 3240.

In the interest, then, of a just and uniform resolution of this issue, as well as in the interest of judicial economy, which will continue to be thwarted until this issue is resolved by this Court, Appellant respectfully requests the opportunity to present this issue for plenary consideration.

II. Appellant's waiver of his "*Miranda* rights," having been obtained while Appellant allegedly was intoxicated and after Appellant had unequivocally requested the presence of an attorney, did not satisfy the minimum constitutionally guaranteed standards.

A. Appellant's incapacity to waive his rights.

Appellant challenged the admission into evidence of certain self-incriminating statements at every possible opportunity in the state proceedings below. Appellant consistently maintained that his physical and mental condition were such that he was incapable of knowingly and intelligently waiving his privilege against self-incrimination.

Because of the fundamental importance of privileges guaranteed by the Fifth Amendment, this Court has stated that to establish a waiver of these rights, the State must meet the heavy burden of proving that there was "an *intentional* relinquishment or abandonment of a known right or privilege" on the part of the defendant. *Johnson* v. *Zerbst,* 304 U.S. at 464. *See, Schneckloth* v. *Bustamonte,* 412 U.S. 218, 235 (1973). Expanding on the standard to be observed, the Supreme Court has said that any waiver of these rights must be "the product of a rational intellect and a free will." *Townsend* v. *Sain,* 372 U.S. 293 (1963); *see, Mincey* v. *Arizona,* _____ U.S. _____, 98 S.Ct. 2408, 2417 (1978). "The defendant may waive effectuation of these rights, provided that the waiver is made voluntarily, knowingly and intelligently," *Miranda* v. *Arizona,* 348 U.S. at 444.

In evaluating the validity of a waiver of these rights and the admissibility of any subsequent incriminating statements, this Court has observed that, if a defendant's "capacity for self-determination [has been] critically impaired, the use of his confession offends due process." *Schneckloth* v. *Bustamonte,* 412 U.S. at 226-227 (citations omitted).

Appellant contends that, not having been advised of his rights until he arrived at the police station, the trial court's ruling that he knowingly and intelligently waived his rights at the scene of the accident was a denial of his constitutional rights. "[A]n individual will not be deemed to have made a knowing and intelligent waiver of his 'right to silence' unless the authorities have first informed him of that right." *Michigan* v. *Mosley,* 423 U.S. 96, 108 (1975) (White, J., concurring).

Appellant further maintains that his physical and mental incapacity resulting from the accident and attested to by both the State and the appellant is dramatically inconsistent with the trial court's conclusion of law that appellant knowingly and intelligently waived his rights in connection with the self-incriminating statements obtained by the officer at the police station.

Whether appellant was under the influence of intoxicating liquor as the State contends, or dazed and in a state of shock as he contends, his behavior at the time that the alleged waiver occurred clearly revealed a lack of sound, reasoning judgment. To cursorily conclude, then, that appellant knowingly and intelligently waived his rights makes a mockery of the procedural safeguards established by this Court.

B . The continued interrogation of appellant after he had requested an attorney be present was a violation of his rights.

Before the Vermont Supreme Court, appellant argued that the arresting officer's immediate resumption of questioning after the appellant unequivocally requested the presence of an attorney, violated appellant's Fifth Amendment rights. The Vermont Supreme Court, however, found no error in this immediate resumption of questioning.

This Court, in *Miranda* delineated the procedure to be followed to safeguard an individual's Constitutional rights. Therein, this Court said that:

> If the individual states that he wants an attorney, *the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Id., at 474 (emphasis added, footnotes omitted). *Fare* v. *Michael C.,* U.S. (1979); *Michigan* v. *Mosley,* 423 U.S. 96 (1975). Distinguishing between the procedural safeguards triggered by a request to remain silent and a request for an attorney this Court restated: "'the interrogation must cease until an attorney is present' only '[i]f the individual states he wants an attorney.'" *Michigan* v. *Mosley,* 423 U.S. at 103, n. 10 (citations omitted). Similarly, in *Fare* v. *Michael C.,* _____ U.S. _____, 99 S.Ct. 2560 (1979), this Court observed that, "if the accused indicates in any manner that he wishes to consult an attorney, interrogation must cease, and any statement obtained from him during interrogation thereafter may not be admitted against him at his trial" 99 S.Ct. at 2563 (citation omitted). Continuing, this Court said:

> The *per se* aspect of *Miranda* was based on the unique role the lawyer plays in the adversarial system of criminal justice in this country the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. *For this reason the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.*

99 S.Ct at 2569.

Appellant maintains, based on these well reasoned precedents, that the immediate resumption of questioning after the appellant had, based on the State's own evidence, unequivocally expressed his right to have counsel present was a violation of his constitutional rights meriting plenary review by this Court.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal and provide appellant with the opportunity to more fully present to this Court the issues here in question.

Respectfully submitted,

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December 17, 1979

In The

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October Term, 1979

No.

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Appellee.

ON APPEAL FROM
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JURISDICTIONAL STATEMENT

APPENDIX

APPENDIX A

TRANSCRIPT OF THE RULING OF THE VERMONT DISTRICT COURT UNIT ONE, BENNINGTON CIRCUIT ON APPELLANT'S MOTION TO SUPPRESS APRIL 3, 1978 JUDGE RONALD F. KILBURN

The Court is prepared to rule.

First, with regard to your request to have the matter certified up at this late a date on the evening of a trial, and the jury having been selected and administered the oath, and the matter having been scheduled for trial tomorrow, and it involving an incident which occurred in July of 1977, the Court denies the motion to have the issue certified at this stage of the proceedings.

On the basis of the evidence as now stands, and that which the Court has received in connection with the hearing on this motion, on which evidence has already been recited on the record, the Motion to Suppress Evidence is denied.

First, the Motion to Suppress all evidence obtained by the Police following initial contact with the Defendant, as set forth in paragraph one — Defendant's motion is denied. Paragraph number two, as it relates to all statements made by the Defendant after his accident, that they be suppressed, is also denied. And thirdly, which the Court treats as being included, in a sense, within paragraph one, the result of all chemical tests given by the Defendant to the law enforcement officers — Request to suppress those results is also denied on the status of the evidence now before the Court.

The Court will recite orally some brief essential findings on the record to support the decision in that regard.

First, the Court finds, on the basis of the evidence, that the Defendant Victor Wall was the operator of the motor vehicle on the Route number 30, on the evening of July 9, 1977 at the

Town of Winhall, within this territorial district. That such operation occurred at or about three minutes after 10 o'clock in the evening. Further, the Defendant, as a result of said operation was involved in a single car accident, having come in contact with some guard rails, resulting in damage to the motor vehicle he was operating and damage to the guard rails.

Further, just previous to the accident, the Defendant was observed operating in an irradic manner — that is left of the center — and which operation resulted in contact with the guard rails in question.

Further, that both the operation and the accident were observed by the witness, Barker, who testified in these proceedings.

Further, that the witness, Barker, approached the Defendant following said accident, examined his physical condition sufficient to determine, in his own mind at least, that the Defendant was not suffering from any physical injuries as a result of the accident.

Further, that the witness offered to the Defendant medical treatment as a part of his own standard operating procedure with regard to motor vehicle operators who are involved in accidents on the highway.

Further, that the Defendant declined such medical treatment, and further, that the Defendant stated to the witness, Barker, that he was not suffering any physical injuries. This is supported by the testimony of the Officer given here in Court and is also supported by State's A, which shows the answer to the question "Any recent injury?" as being "None."

Further, that the Defendant hesitated at first, in connection with responding to questions, until he had had an opportunity to attempt to contact an attorney.

Further, that after attempting to contact an attorney and not being successful, he agreed to proceed and answer questions by the Officer.

Further, that these answers were given subsequent to the recitation of rights to which he was entitled by virtue of the constitution and by virtue of the Miranda decision.

Further, that he consented to the taking of the sample of his breath.

Further, that the sample of his breath, as taken by the Officer, resulted in a test report, and I am emphasizing a test report only which is available for the Court's consideration for the purposes of this hearing, and which test report indicates a result of .20.

Further, that the Defendant recently, by way of an affidavit filed with the Court in connection with this hearing, which affidavit is dated the 30th of March, 1978, indicates that he suffered certain injuries such as being dizzy and having a bleeding head and having been stunned as a result of the accident. That he did not fully recover until the next day.

Further, that an unsigned affidavit, Defendant's C, preporting to come from one Dr. Marshall Bernstein, indicates that the Defendant was examined by Dr. Bernstein, a Physician, in Bridgeport, Connecticut on the 11 day of July; some two days after the operation and accident in question. By operation, the Court means a motor vehicle operation.

Further, that the doctor concludes in his affidavit that a lump on the top of his head, observed by the physician, reveals in all probability, a lump which resulted in a concussion; and further, that the symptoms related by the Defendant at the time of that examination preport to be consistent with the nature of the injuries stated.

The Court concludes, as a Conclusion of Law, that the Defendant knowingly and intelligently waived his rights in connection with the verbal statement given to the Officer, both at the scene and following, during the processing of the Defendant for the case at hand; and secondly, the Court concludes, as a matter of

law, that the Defendant voluntarily consented to the taking of the sample of his breath which resulted in the test before the Court at this time.

The Court sees the arguments and issues raised by Counsel for the Defendant as being issues which go to the weight of the evidence at this stage of the proceeding and not to the admissibility of the evidence.

The Court, as previously stated, the Motion to Suppress on all grounds is denied. However, I will give leave to Counsel for the Defendant to review the motion in the event that the evidence changed substantially from the evidence before the Court at this time.

APPENDIX B

SUPREME COURT
FORM NO. 1

VT. SUPREME COURT
FILED IN CLERK'S OFFICE
SEP 1 71979

ENTRY ORDER

SUPREME COURT DOCKET NO. 161-78
June TERM, 19 79

State of Vermont

V.

Victor J. Wall

APPEALED FROM:
District Court of Vermont,
Unit No. 1, Bennington Circuit

DOCKET NO. 786-77Ber

In the above entitled cause the Clerk will enter:

Judgment affirmed.

Dissenting

2M 5-73

FOR THE COURT:

Rudolph J. Daley, Associate Justice
Concurring

Albert W. Barney, Chief Justice

Robert W. Larrow, Associate Justice

William C. Hill, Associate Justice

Hilford K. Smith, Associate Justice (Ret.)
Specially Assigned

Supreme Court
On Appeal From District Court of Vermont, Unit No. 1, Bennington Circuit

State of Vermont
v.
Victor J. Wall

Present: Barney, C.J., Daley, Larrow and Hill, JJ., and Smith, J. (Ret.), Specially Assigned

DALEY, J. The defendant appeals from his conviction, after trial by jury, of operating a motor vehicle upon a highway, while under the influence of intoxicating liquor, in violation of 23 V.S.A. § 1201(a)(2). We affirm.

The record shows the following: On a clear, summer night in July, 1977, a police officer in the village of Bondville, Vermont, saw a Lincoln Continental weave back and forth across the center line and then, as the road curved, continue straight ahead, slamming into four guard rails in the left lane. The officer rushed to the vehicle, which the driver, the defendant here, was attempting to drive away. The defendant was unsuccessful, however, because the impact had immobilized the car. After the door was jarred loose, the defendant stumbled out. His breath smelled strongly of alcoholic beverages and his eyes were bloodshot. The officer asked him if he wished to see a doctor. He indicated that he was not injured and refused medical assistance. After examining him for injuries and finding none, the officer took him into custody.

At the police station, the defendant was read *Miranda* warnings and asked to take a breath test. The defendant was advised, consistently with 23 V.S.A. § 1205(a), that if he refused the breath test it would not be administered but such refusal might be used as evidence against him in a criminal proceeding. He pleaded with the officer to charge him with something other than D.W.I. and initially declined to take the breath test. He refused to sign a *Miranda* form waiving his rights and stated

that he would not answer any questions until after he had consulted with an attorney. After he failed to reach the lawyer he wanted, he agreed to the test. He also verbally permitted the officer to question him. During the ensuing interrogation, he admitted that he thought he was under the influence. The breath test results showed a blood alcohol content by weight of .20 per cent.

The defendant first claims that the warning that evidence of a refusal might be used against him in a criminal proceeding is erroneous because such evidence is actually inadmissible by virtue of the Fifth Amendment. He did not raise this claim below, but nonetheless urges our consideration on the ground of "glaring error." In *State* v. *Brean,* 136 Vt. 147, 385 A.2d 1085 (1978), we held that such evidence does not violate the privilege against self-incrimination. In *State* v. *Welch,* 136 Vt. 442, 395 A.2d 1115 (1978), we reiterated that holding. See also, *Welch* v. *District Court,* 594 F.2d 903 (2d Cir. 1979); *City of Westerville* v. *Cunningham,* 15 Ohio St. 2d 121, 239 N.E.2d 40 (1948); *People* v. *Sudduth,* 65 Cal.2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966) (Traynor, C.J.); Annot., 87 A.L.R.2d 370 § 5 (1963). We find no reason to again consider the issue, especially where the defendant not only consented rather than refused but also failed to raise the objection at trial.

The defendant next claims that the court erred in admitting the breath test results and his statements to police. He proffers two grounds. First, he renews his objection, made in the lower court, that he lacked the capacity to "knowingly and intelligently" consent to the breath test and to waive his rights. He contends that a blow to the head, sustained during the accident, caused a concussion, thereby incapacitating him and making any consent to waiver "involuntary," in the sense that it could not have been "knowingly and intelligently" made. His second objection, which he raises here for the first time, is that his right to remain silent was violated by the resumption of questioning after he had refused to sign a waiver and refused to answer questions until he consulted with his attorney.

The question of capacity was raised below by motion to suppress. Upon pretrial hearing, the court concluded that the waiver and the consent were knowingly and intelligently given. On appeal, the defendant asserts that the court's conclusion is not supported by the findings and that it is inconsistent with the evidence.

In support of his motion below, the defendant offered two affidavits. One was from a physician who saw him two days after the accident. The doctor stated that he was "dizzy and stunned" at the time of the accident and that he was then probably suffering from a concussion. The other affidavit was prepared by the defendant himself. It too recited that he was "dizzy and stunned." The defendant buttressed his claim of concussion and resulting incapacity by pointing to State's evidence that he stumbled as he got out of his car, that his words to the officer were slurred, and that, at one point, he stepped out of the police cruiser and staggered onto the travelled portion of the highway. In rejecting the defendant's claim, the court found that, at the time of the accident, he denied injury and refused medical assistance, that the officer found no sign of injury, and that the defendant exercised the very rights which he claimed to lack the capacity to waive.

The weight and sufficiency of the evidence as well as the credibility of the witnesses and the persuasive effect of their testimony is for the trial court. Its determination must stand if supported by credible evidence, although there may be inconsistencies or even substantial evidence to the contrary. *State* v. *Rochleau,* 131 Vt. 563, 574, 313 A.2d 33, 41 (1973). Unless it can be said as a matter of law that the court's determination was wrong, it must stand. *Id.; State* v. *Goyet,* 120 Vt. 12, 36, 132 A.2d 623, 639 (1957). Although the question of capacity was controverted, the court's conclusion is supported both by its findings and the evidence. We find no error.

The defendant's next claim is that his right to remain silent was violated by police procedure, a contention which he initiates here. In urging error, he argues in essence that the police failed

to honor his decision to remain silent. Because this issue was not raised below, however, it will not be considered here in the absence of glaring error.

"Where an error is 'a glaring error...so grave and serious that it strikes at the very heart of [a defendant's] constitutional rights,' a failure to raise it in the trial court will not bar its assertion here." *State* v. *Kasper,* 137 Vt. _____, _____, _____ A.2d _____, _____ (1979). In such a case, the "defect should be noticed by the trial judge *sua sponte*...." *Id.* We do not find such error in the defendant's claim of procedural violations of his *Miranda* rights. No evidence of coercion or undue influence appears in the record. Indeed, to the contrary, the record shows that the defendant was questioned with his consent. In these circumstances, we do not find "glaring error."

The defendant's following claims, which were not presented to the trial court, are also waived. They are that the trial court erred in not submitting the issue of his waiver of *Miranda* rights to the jury and in admitting evidence that the defendant was advised that he could have an independent blood sample taken. We have examined the record, but we find no error so glaring and grave that it strikes at the very heart of his constitutional rights. Nor is there any reasonable basis for a fear that injustice has been done.

Finally, the defendant claims error in the court's instructions to the jury. He objects to that part of the charge that if the jury found him to be in the slightest degree under the influence, it would be enough to sustain a conviction under 23 V.S.A. § 1201(a), which makes it an offense to operate a motor vehicle while under the influence of intoxicating liquor. The court's charge, however, was correct under our holding in *State* v. *Storrs,* 105 Vt. 180, 185, 163 A. 560, 562 (1933).

Judgment affirmed.

FOR THE COURT:

/s/ Rudolph J. Daley
Associate Justice